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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA

In re PRISCILLA MONTOYA, Debtor.	}	Case No. 06-00303-B13 MEMORANDUM DECISION
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I.

INTRODUCTION

Priscilla Montoya ("Debtor") has filed this motion to continue the automatic stay as to all creditors beyond the 30th day after the filing of this bankruptcy case pursuant to 11 U.S.C. § 362(c)(3)(B) ("Motion").¹ Although the Motion is unopposed, this section requires a court to make its own determination as to whether it may continue the stay. For the reasons more fully set forth below, the Court grants the Motion.

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¹ This section was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8 (2005), effective in cases commenced on or after October 17, 2005. Hereinafter, all code and section references are to 11 U.S.C. § 101 *et seq.* unless otherwise specified.

1 II.

2 FACTUAL BACKGROUND

3 A. Debtor's Prior Chapter 13 Bankruptcy Case.

4 Prior to filing this chapter 13 bankruptcy case, Debtor filed a chapter 13 case
5 on January 27, 2005 ("Prior Case").² Debtor's Prior Case scheduled secured claims
6 of \$32,122 and general unsecured claims of \$11,849. Debtor confirmed a plan of
7 reorganization by order entered March 4, 2005, providing for monthly payments of
8 \$430 with a 16% dividend to general unsecured creditors. [P.C. Doc. # 2 and 10]

9 Debtor's Schedule "I" indicated she was employed in the "Medical Records"
10 field with the same employer for five years, bringing home a net monthly pay of
11 \$2,561 as her sole source of income. Debtor's Schedule "J" lists monthly expenses
12 of \$2,130, leaving her \$431 in disposable income for her monthly plan payments.³
13 [P.C. Doc. #1]

14 Debtor made all her plan payments in the prior case; however, she determined
15 she could not proceed with her plan for personal reasons, so she moved to dismiss the
16 case.⁴ [P.C. Doc. #18] The trustee did not oppose the motion and, in June 2005, the
17 prior case was dismissed. [P.C. Doc. # 20]

18 B. Debtor's Current Chapter 13 Bankruptcy Case.

19 Debtor filed this chapter 13 case on February 24, 2006. Debtor's plan of
20 reorganization proposes monthly payments of \$500 with a 45% dividend to general
21 unsecured creditors. [Doc. #2]

22 _____
23 ² The prior case is Southern District of California Bankruptcy Case No. 05-00590-H13.
24 Hereinafter, the docket entries for the Prior Case are referred to as "P.C. Doc. # ____."

25 ³ This information is not provided in the Motion; although it is pertinent to the Court's
26 ruling. *See* § 362(c)(3)(C)(i)(III).

27 ⁴ Debtor explains that she and her former husband had assisted her parents in financing a
28 house. After their divorce, her parents wanted to refinance to remove her former husband from title.
During her Prior Case, Debtor learned the lender required dismissal of her bankruptcy as condition
to funding the new loan. [Declaration at ¶¶ 5-6]

1 Debtor's petition scheduled no secured claims, a 2005 priority tax claim of
2 \$2,036 and general unsecured claims of \$29,562. With the exception of her tax debt,
3 Debtor's overall debts have not increased. Rather, they were reclassified from
4 secured to general unsecured claims as a result of two vehicles being returned or
5 repossessed. Debtor no longer owns a vehicle.

6 Debtor's schedule "I" indicates she is a single mother with two young children.
7 She remains employed in the medical records field with the same employer where she
8 earns a net monthly income of \$2,909 as her sole source of income. Debtor's
9 Schedule "J" lists monthly expenses of \$2,409, leaving \$500 to make her monthly
10 plan payments. Accordingly, Debtor has slightly more disposable income to fund a
11 plan than in her Prior Case.

12 In accordance with § 362(c)(3)(B), Debtor filed and served this Motion prior
13 to the 30th day after the petition date, and this hearing was held prior to the 30th day
14 at which time the Court took the matter under submission. Debtor does not expressly
15 state that she served the Motion on all of her creditors, although the accompanying
16 proof of service appears complete. The Motion is unopposed.

17 III.

18 LEGAL ANALYSIS

19
20 Under BAPCPA, the automatic stay no longer applies uniformly to all debtors.
21 New § 362(c)(3)(A) limits the duration of the automatic stay for debtors who had a
22 pending case dismissed within the 1-year preceding the most recent bankruptcy case.
23 Specifically, this section provides:

24 (3) if a single or joint case is filed by or against debtor who
25 is an individual in a case under chapter 7, 11, or 13, and if
26 a single or joint case of the debtor was pending within the
27 preceding 1-year period but was dismissed, other than a
28 case refiled under a chapter other than chapter 7 after
dismissal under section 707(b)--

1 (A) the stay under subsection (a) with respect to any action
2 taken with respect to a debt or property securing such debt
3 or with respect to any lease shall terminate with respect to
4 the debtor on the 30th day after the filing of the later case....

5 Nonetheless, § 362(c)(3)(B) provides the stay "may" be continued beyond the
6 30-day period prescribed by subparagraph (A) if four minimum requirements are met:
7
8 (1) a motion is filed; (2) there is notice and a hearing; (3) the hearing is completed
9 before the expiration of the 30-day stay; and (4) the debtor proves that the filing of the
10 new case "is in good faith as to the creditors to be stayed." *In re Charles* ("Charles I"),
11 332 B.R. 538, 541 (Bankr. S.D. Tex. 2005); *In re Montoya*, 333 B.R. 449, 453 (Bankr.
12 D. Utah 2005); *In re Collins*, 335 B.R. 646, 650 (Bankr. S.D. Texas 2005)(parsing the
13 precise language of § 362(c)(3)(B) to determine the "minimum requirements" to
14 continue the stay beyond the first 30 days).

15
16 The movant bears the burden of proof of establishing these minimum
17 requirements. *Charles I*, 332 B.R. at 541-42. Upon meeting these minimum
18 requirements, the court "may" then continue the stay "subject to such conditions or
19 limitations as the court may then impose." § 362(c)(3)(B).

20
21 Although the statute contains four minimum requirements, the bulk of the legal
22 analysis is on the fourth requirement (proving that the filing of the new case was in
23 good faith). *Collins*, 335 B.R. at 650. Section 362(c)(3)(C) provides that for purposes
24 of subparagraph (B), a case is presumptively filed in bad faith:
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1 (i) *as to all creditors*, if--

2 (I) more than 1 previous case under any of chapters 7, 11,
3 and 13 in which the individual was a debtor was pending
4 within the preceding 1-year period;

5 (II) a previous case under any of chapters 7, 11, and 13 in
6 which the individual was a debtor was dismissed within
7 such 1-year period, after the debtor failed to--

8 (aa) file or amend the petition or other documents as
9 required by this title or the court without substantial
10 excuse (but mere inadvertence or negligence shall not
11 be a substantial excuse unless the dismissal was
12 caused by the negligence of the debtor's attorney);

13 (bb) provide adequate protection as ordered by the
14 court; or

15 (cc) perform the terms of a plan confirmed by the
16 court; or

17 (III) there has not been a substantial change in the financial
18 or personal affairs of the debtor since the dismissal of the
19 next most previous case under chapter 7, 11, or 13 or any
20 other reason to conclude that the later case will be
21 concluded--

22 (aa) if a case under chapter 7, with a discharge; or

23 (bb) if a case under chapter 11 or 13, with a
24 confirmed plan that will be fully performed; and

25 (ii) *as to any creditor* that commenced an action under subsection (d) in
26 a previous case in which the individual was a debtor if, as of the date of
27 dismissal of such case, that action was still pending or had been resolved
28 by terminating, conditioning, or limiting the stay as to actions of such
creditor; and⁵

[Emphasis added.] The presence of any of the above-listed events gives rise to a
rebuttable presumption of bad faith. If the presumption of bad faith arises, the movant

⁵ Section 362(c)(3)(C)(ii) is factually inapplicable because no creditor filed a motion for relief from stay in the Prior Case.

1 must rebut the presumption by “clear and convincing evidence to the contrary.”
2 § 362(c)(3)(C); *Collin* at 651; *In re Charles* (“*Charles II*”), 334 B.R. 207, 215-217
3
4 (Bankr. S.D. Tex. 2005). In contrast, if the court finds there is no presumption of bad
5 faith arising under § 362(c)(3)(C)(i) or (ii), then the burden of establishing good faith
6
7 is reduced to preponderance of the evidence. *Collins* at 651; *Charles II*, 334 B.R. at
8 217.

9 The burden of establishing the presence of presumptive bad faith rests upon the
10
11 opponent to the motion. *Collins* at 650-51; *Charles II* at 215-17. Notwithstanding, the
12 lack of opposition does not require the Court to continue the stay.
13
14 Section 362(c)(3)(B) directs that a court may continue the stay “*only if* the party in
15 interest [movant] demonstrates that the filing of the later case is in good faith ...”
16 (emphasis added). This necessarily means a court must make its own determination
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18 of good faith under the applicable evidentiary standard before it may continue the stay.
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20 Consequently, the moving papers must establish the nonexistence of presumptive bad
21 faith, or the moving papers must admit and rebut the presumption, even though the
22 burden of proof technically rests upon the opponent and the motion may be
23 unopposed.⁶

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26 ⁶ Necessarily, the movant must provide detailed, competent, evidence to satisfy all elements
27 of § 362(c)(3)(B) and, if applicable, to rebut the presumption of bad faith in § 362(c)(3)(C). The
28 evidence must be filed and served with the motion so that creditors can evaluate the integrity of the
current case, and so that the court determine under the applicable evidentiary standard whether the
later case was filed in good faith. *In re Wilson*, 336 B.R. 338, 347-49 (Bankr. E.D. Tenn. 2005).

1 Debtor has two arguments in favor of continuing the stay. First, she argues the
2 presumption of bad faith does not apply because § 362(c)(3) only applies where the
3 prior case was filed on or after October 17, 2005, and thereafter dismissed. [Motion
4 at 2] Alternatively, Debtor argues she has overcome the presumption of bad faith by
5 clear and convincing evidence because she had only one prior case pending within the
6 previous year and she fully performed her duties and obligations until she voluntarily
7 dismissed her case. [Motion at 3-6]

8 Debtor's first argument flies in the face of § 362(c)(3)(C). This section applies
9 to all cases filed on or after October 17, 2005, and it expressly refers to the situation
10 where there was a prior case "pending within the preceding 1-year period."
11 § 362(c)(3). By use of the term "pending," Congress wrote retroactivity into this
12 statute. *See* 2005 Bankr. Reform Legis. with Analysis 2d at § 7:16. Because Debtor
13 had a prior case pending within the preceding 1-year period, § 362(c)(3) applies.

14 With respect to Debtor's second argument, no presumption of bad faith arises
15 in this case. The presumption never arises because none of the events set forth in
16 § 362(c)(3)(C)(i) or (ii) are present in this case. Debtor had only one other pending
17 bankruptcy case within the preceding year which she voluntarily dismissed even
18 though she was current with her plan payments and her duties and obligations. There
19 was no motion for relief from stay filed and there was no adequate protection order in
20 the case. Moreover, Debtor's financial situation has improved resulting in her
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1 proposal of a significantly higher 45% plan in comparison to the 16% plan in her Prior
2 Case.⁷
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4 Because the presumption of bad faith does not arise, the Court need only
5 determine whether Debtor has established the four minimum requirements of
6 § 362(c)(3)(B) by a preponderance of the evidence.⁸ § 362(c)(3)(B). In the present
7 case, the Motion attests that it was filed and served prior to the 30th day after the
8 petition date, and the hearing was held prior to the 30th day. The Motion does not
9 affirmatively represent it was properly served on all of Debtor's creditors, but in
10 comparing the proof of service with the list of creditors, it appears that it was. In the
11 future, motions of this nature should affirmatively state they are served on all
12 creditors.
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18 ⁷ Although Debtor's financial situation has improved for purposes of this Motion, arguably
19 Debtor's personal affairs have worsened. Debtor faces the challenge of being a single working
20 mother raising two young children without her own vehicle in a city with poor public transportation.
21 This obstacle creates doubt about Debtor's true ability to perform the plan for the full five years, but
the Court will not speculate since her financial situation has improved.

22 ⁸ In contrast, the "clear and convincing evidence" standard is a much stricter standard to
23 meet. This standard is defined as that degree or measure of proof which will produce in the mind of
24 the trier of fact, a firm belief or conviction that the allegations sought to be established are true; it
25 is "evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a
26 clear conviction, without hesitancy, of the truth of the precise facts of the case." *Charles I* at 542;
27 *Collins* at n. 4; *Wilson*, 336 B.R. at 347. Given the inherent uncertainty concerning what can happen
28 over a period of five years, it is difficult to discern a factual situation that would enable a court to
conclude with this degree of certainty that a debtor's bankruptcy case was filed in good faith and the
case will result in a confirmed plan that will be fully performed. See § 362(c)(3)(C)(i)(III).
Fortunately, the Court need not reach this issue since the preponderance of evidence standard applies
to this case.

1 Finally, the Debtor must prove by a preponderance of evidence that the new
2 case was filed in good faith as to the creditors sought to be stayed. § 362(c)(3)(B).
3
4 Section 362(c)(3) does not define good faith for purposes of this determination. The
5 concept of what constitutes a bad faith bankruptcy filing is, however, well defined by
6 pre-BAPCPA case law as being a “totality of circumstances” test. In view of the
7 minimal guidance from Congress, the Court will follow the reasoning of the other
8 courts that have imported pre-BAPCPA case law into § 362(c)(3)(B). Accordingly,
9 the Court will utilize the “totality of circumstances” test to assist its determination of
10 whether the Debtor filed her new case in good faith as to the creditors she seeks to
11 stay. § 362(c)(3)(B); *Charles II* at 217-18; *see also In re Havner*, 336 B.R. 98,
12 103-104 (Bankr. M.D.N.C. 2006); *In re Baldassaro*, __ B.R. __, 2006 WL 459201,
13 *7 (Bankr. D.N.H. Feb. 24, 2006).

14
15 In this circuit, the “totality of circumstances” test for determining whether a
16 debtor filed a chapter 13 case in good faith includes: 1) whether debtor misrepresented
17 facts in the petition or the plan, unfairly manipulated the Code or otherwise filed the
18 current chapter 13 plan or petition in an inequitable manner; 2) debtor’s history of
19 filings and dismissals; 3) whether debtor only intended to defeat state court litigation;
20 and 4) whether egregious behavior is present. *In re Leavitt*, 171 F.3d 1219, 1224
21 (9th Cir. 1999); *see also In re Villanueva*, 274 B.R. 836, 841 (9th Cir. BAP 2002)
22 (listing factors to evaluate whether a chapter 13 plan has been proposed in good faith).

1 In this case, the Court concludes Debtor has provided evidence of her good faith
2 by a preponderance of the evidence. Debtor states she is determined to complete her
3 plan, which proposes a \$500 monthly payment and a 45% dividend to unsecured
4 creditors. This is an improvement over her prior case and evidence of good faith.
5 Further, Debtor says, without much explanation, she must complete the plan for the
6 benefit of her children and she has made the necessary financial changes to improve
7 her financial situation. It would appear she is alluding to the fact that she has
8 surrendered two vehicles since the prior case was dismissed. Given her voluntary
9 dismissal of the prior case and the lack of opposition to this Motion, there is simply
10 no reason for the Court to conclude Debtor's latest bankruptcy filing was anything
11 other than in good faith.
12

13 Even though the Court may be satisfied that Debtor has proved the four
14 elements of § 362(c)(3)(B) by a preponderance of the evidence, extension of the stay
15 is not automatic but rather discretionary because § 362(c)(3)(B) utilizes the term
16 "may" and not "shall". *Charles II*, 334 B.R. at 223. Of course, it would be an abuse
17 of that discretion where, as here, there is no apparent reason to decline to continue the
18 stay. Accordingly, the Motion is granted.
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1 V.

2 **CONCLUSION**

3
4 Debtor has satisfied the four minimum requirements contained in § 362(c)(3)(B)
5 to allow the Court to continue the stay. Debtor timely filed the Motion seeking to
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7 continue the stay within the first 30 days. Debtor appears to have given proper notice
8 of the Motion and the hearing to all of her creditors; although the Motion should have
9 included an affirmative statement that this requirement is met. And, the hearing on the
10 Motion was also held within the first 30 days. Only the fourth requirement is at issue
11 in this case.
12

13 With respect to the fourth requirement of good faith as to the creditors to be
14 stayed, the Court finds this requirement has been met by a preponderance of the
15 evidence. Debtor had a prior pending case which she voluntarily dismissed within in
16 the preceding year, but there is no presumptive bad faith and the “totality of
17 circumstances” indicates Debtor filed this case in good faith as to all of her creditors.
18 These creditors must agree as none has filed objection to her Motion.
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22 It is unfortunate that a debtor in this factual situation had to incur the expense
23 of filing this Motion. It is also unfortunate she had to pay counsel to attend a hearing
24 on an unopposed motion where there is simply no reason to question her good faith.
25 It is a waste of Debtor’s limited resources and it is a waste of the Court’s time.
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1 The Motion is granted as to all creditors. Debtor is directed to prepare and file
2 an order granting the Motion within ten days of the date of entry of this Memorandum
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4 Decision.

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7 Dated: 12 Apr 06


LOUISE DE CARL ADLER, Judge

CAD 168
[Revised July 1985]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 06-00303-B13
Case Name: In Re: PRISCILLA MONTOYA

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the Office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to-wit:

MEMORANDUM DECISION

was enclosed in a stamped and sealed envelope and mailed to the following parties at their respective addresses listed below:

Debtor

Priscilla Pecina Montoya
1428 Grove Street
San Diego CA 92102

Trustee

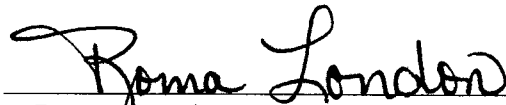
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The envelope(s) containing the above document was deposited in a regular United States mail box in the City of San Diego in said district on April 12, 2006.

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Roma London, Deputy Clerk